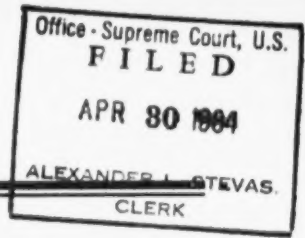


No. 83-1617



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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LINWARD COLEMAN,

*Petitioner,*

v.

AMERICAN CYANAMID COMPANY,

*Respondent,*

v.

RABEY ELECTRIC COMPANY, INC.,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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ALAN S. GAYNOR  
Post Office Box 2139  
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*Counsel for Respondent  
American Cyanamid Company*

**QUESTION PRESENTED FOR REVIEW**

The issue is whether the District Court erred in granting Respondents' Motions for summary judgment where respondent American Cyanamid Company was given "statutory employer" status under the Georgia Workers' Compensation Act and was therefore immune from tort suit within the meaning of the Georgia Workers' Compensation Act, where the Georgia Court of Appeals overruled the cases that the District Court relied upon in its order granting summary judgment to Respondents.

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**PARTIES TO THE PROCEEDING**

The caption contains the names of all parties to this proceeding.

**OPINIONS**

The relevant opinions are contained in the appendix to petitioner's petition and will therefore not be reproduced herein.

**JURISDICTION**

Jurisdiction is invoked under 28 USC § 2101 (c). Petitioner's petition was filed and served within ninety (90) days of the denial of petitioner's Motion for Rehearing in the Court of Appeals.

### STATUTES INVOLVED

Official Code of Georgia Ann. § 34-9-8 (a) (Michie, 1982) provides as follows:

A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer.

Official Code of Georgia Ann. § 34-9-11 (Michie, 1982) provides as follows:

The rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death; provided, however, that no employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship exists between the injured employee and the person providing the benefits.

### STATEMENT OF THE CASE

Respondent accepts the petitioner's statement of the case except that respondent objects to petitioner's statement that petitioner's injuries were "due solely to the negligence of Cyanamid" as being unsupported by the record. Respondent also would supplement petitioner's statement by pointing out that *Modlin v. Black and Decker Manufacturing Co.*, \_\_\_\_ Ga. App. \_\_\_\_ (Case No. 67781, March 5, 1984) was not decided until two months after petitioner's Motion for Rehearing was de-

nied on January 3, 1984 by the Court of Appeals for the Eleventh Circuit. Also, it should be noted that application for a writ of certiorari to the Georgia Supreme Court in *Modlin* is imminent as reflected in Appendix A to this Response (Appendix, hereinafter referred to as "A" at 1.).

### SUMMARY OF ARGUMENT

This case presents an issue of Georgia Workers' Compensation law involving no substantial federal issue. Prior to the Georgia Court of Appeals' decision in *Modlin v. Black and Decker Manufacturing Company*, \_\_\_\_ G. App. \_\_\_\_ (Case No. 67781 decided March 5, 1984) it was well settled under Georgia law that the employee of a contractor working upon the premises of a land owner was barred from suing the land owner because of the owner's status as a statutory employer under the Georgia Workers' Compensation Statute. This pre-*Modlin* law governed the decision of the district court and the court of appeals in this case. It must be emphasized that the decision in *Modlin* was not issued until two months after the court of appeals denied petitioner's Motion for Rehearing. Thus, the court of appeals and the district court correctly applied the law of Georgia as it existed at the time they made their rulings. Moreover, the Georgia Supreme Court may modify the *Modlin* decision since a notice of intention to apply for a writ of certiorari has been filed with the Georgia Court of Appeals. (A.-1) Accordingly, special and important reasons do not exist in this case so as to compel this Court to exercise its discretion to review the district court's decision as affirmed by the court of appeals.

Assuming *arguendo* that the *Modlin* decision requires a reexamination of the judgment rendered in this case, it is clear that the Courts of Georgia would not apply *Mod-*



*lin* retroactively so as to overturn that judgment. Workers' compensation law is based on the *quid pro quo* that exposure to workers' compensation liability should result in immunity from tort liability. Respondent has been exposed to workers' compensation liability under the law of the State of Georgia as it existed prior to *Modlin*. Given the facts of this case and the applicable Georgia precedent, it appears that the *Modlin* decision will be applied prospectively only and not retroactively so as to affect the result reached by the district court and the court of appeals.

#### ARGUMENT

Unlike Rule 19 of Rules of the Supreme Court of the United States as promulgated in 1970, Rule 17 of this Court's rules, as amended in 1980, does not enumerate as a reason for granting certiorari the case when a court of appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law . . ." While the categories set forth in Rule 17.1 as promulgated in 1980, do not limit the courts' jurisdiction, they do illustrate the types of cases in which review on writ of certiorari is appropriate. Thus it is significant that the petitioner in this case asks the Court to review an issue of Georgia Workers' compensation law that raises no substantial federal question. It also should be noted that the *Modlin* decision relied upon by the petitioner was not decided until after the court of appeals denied petitioner's Motion for Rehearing. The decision of the district court as affirmed by the court of appeals correctly interpreted Georgia law as it existed prior to the *Modlin* decision. See *Godbee v. Western Electric Co.*, 161 Ga. App. 731 (1982). Moreover, the court of appeals ruling *Modlin* is not yet the settled law of the State of Georgia in that notice of appellees' intention to apply for a writ of certiorari has been filed in the Georgia Court of



Appeals. (A.-1) The Courts of Georgia are best able to determine issues of Georgia Workers' Compensation law and no special or important reasons exist for review by this Court on a writ of certiorari.

Even if this Court should choose to exercise its discretion to review the district court's decision as affirmed by the court of appeals, the *Modlin* decision would not require any alteration in that decision since it is clear that the courts of Georgia would not apply *Modlin* retroactively so as to overturn the judgment of the district court. A review of Georgia law indicates that the test set forth in *Chevron Oil v. Huson*, 404 US 97 (1971) most likely would be applied by the Georgia courts in determining whether or not the reasoning of *Modlin* should be applied retroactively. *Walker v. Walker*, 247 Ga. 502, 277 S.E. 2d 245 (1981); *Strickland v. Newton County*, 244 Ga. 54, 258 S.E. 2d 132 (1979); *Allan v. Allan*, 236 Ga. 199, 223 S.E. 2d 245 (1976); *Gainesville Financial Services, Inc. v. McDouglas*, 154 Ga. App. 820, 270 S.E. 2d 40 (1980); *Financeamerica Corp. v. Drake*, 154 Ga. App. 811 270 S.E. 2d 449 (1980).

In *Chevron*, the Supreme Court considered three factors in determining whether a decision should be applied retroactively.

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution is not clearly overshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court

could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (citations omitted.)

404 U.S. at 106-107.

It is beyond doubt that the Court in *Modlin* overruled clear past precedent. In considering the last two *Chevron* factors it must be recognized that the Georgia Workers' Compensation scheme is based on a *quid pro quo* rationale where exposure to workers' compensation liability results in tort immunity. Under the law as it existed prior to *Modlin*, the respondent was exposed to workers' compensation liability. It would be inequitable to now expose the respondent to tort liability. Such a result would directly undermine the *quid pro quo* rationale that serves as the foundation of Georgia Workers' Compensation law. Thus, it appears that the decision of the Georgia Court of Appeals in *Modlin*, if not overruled by the Georgia Supreme Court, will be applied prospectively only and, therefore, does not require reversal of the district court's decision as affirmed by the Eleventh Circuit Court of Appeals.

#### CONCLUSION

It is respectfully submitted that petitioner's Petition For Writ of Certiorari must be denied.

Respectfully submitted,

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Post Office Box 2139  
Savannah, Georgia 31498  
(912) 236-2491

*Counsel for Respondent*

## **APPENDIX**

**APPENDIX A**  
**IN THE COURT OF APPEALS OF GEORGIA**

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**CASE NO. 67781**

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**JERRY R. MODLIN,**

*Appellant*

vs.

**(BLACK AND DECKER MANUFACTURING COMPANY, ET AL.  
SWIFT TEXTILES, INC.,**

*Appellee*

---

Notice is hereby given to the Clerk of the Court of Appeals of appellee's intention to apply for certiorari to the Supreme Court of Georgia.

This 30th day of March, 1984.

**HATCHER, STUBB, LAND, HOLLIS  
& ROTHSCHILD**

/s/ H. H.

*Attorneys for Appellee*

P.O. Box 2707  
Columbus, Georgia 31993  
(404) 324-0201

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Notice of Appellee Swift Textiles, Inc. on Sherrod Taylor, P.O. Box 2565, Columbus, Georgia 31902, attorney for appellant, John T. Laney, III, P.O. Box 1199, Columbus, Georgia 31994, attorney for defendant Lockwood Greene Engineers, Inc., John W. Denney, P.O. Box 2648, Columbus, Georgia 31904, attorney for defendant Potter-Shackleford Construction Company, Inc., and Alan F. Herman, 2800 First Atlanta Tower, Atlanta, Georgia 30383, attorney for defendant Black and Decker Manufacturing Company and/or Black and Decker (U.S.), by mailing a copy of same to each of them at their respective addresses in a sealed envelope, properly addressed and with sufficient postage affixed to carry the same to its destination.

This 30th day of March, 1984.

/s/ H. H.  
Of Counsel for Appellee  
Swift Textiles, Inc.